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IN THE

Supreme Court of the United States

October Term, 1943

—o—

NO. 409

—o—

TENNESSEE COAL, IRON AND RAILROAD COMPANY, Et al,

Petitioners,

vs.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, Et al,

Respondents.

—o—

BRIEF FOR PETITIONER

SLOSS-SHEFFIELD STEEL & IRON COMPANY

—o—

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SLOSS-SHEFFIELD STEEL & IRON COMPANY

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On certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decree of that Court entered on the 16th day of March, 1943, as modified on the 27th day of July, 1943 (R. 4997-5011), modifying and affirming as modified by a divided Court a decree of the District Court for the Southern Division of the Northern District of Alabama entered on the 10th day of September, 1941 (R. 568-9).

I

OPINIONS BELOW

The opinion of the District Court (R. 494-506) is reported in 40 Fed. Supp. 4.

The opinion of the Circuit Court of Appeals (R. 4938-4942) is reported in 135 Fed. (2d) 320.

The opinion of the Circuit Court of Appeals denying petitioners' petition for rehearing (R. 4997-5010) is reported in 137 F. (2d) 176.

The two opinions of the Circuit Court of Appeals appear in the appendix to petitioners' petition for writ of certiorari at pages 64 to 67 and 77 to 95.

II

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925.

III

PARTIES

The petitioners are the owners and operators of underground iron ore mines in Alabama. Petitioners instituted, separately, actions for declaratory judgment under the provisions of the Federal Declaratory Judgment Act, Section 274 (d) of the Judicial Code, 28 U. S. C. 400 (R. 25, 175, 177). The actions were consolidated for trial (R. 487).

Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, was permitted on his own motion to intervene (R. 304-5).

It was admitted by the defendants in each of the petitions and found by the District Court that the local unions named as defendants fairly represented the class of underground ore mining employees of the plaintiffs (R. 565).

IV

BASIC QUESTION INVOLVED

The basic question involved is whether the Fair Labor Standards Act passed June 25, 1938, effective October 24, 1938, Chapter 678, Section 152, Stat. 1060, requires travel time ("portal to portal") to be included in the computation of the "workweek" as prescribed in the Act.

The phrase "portal to portal" as appears in the record and as generally understood includes all the time spent underground by the miners, exclusive of the lunch period. The phrase "face to face" includes the time spent at the usual working places. The phrase "travel time" includes all the time spent by the miners in going from the mouth (portal) of the mine to the usual working places and in returning to the mouth (portal).

V

THE STATUTE

The pertinent provisions of the Act are:

"Section 7. *Maximum Hours.*

"(a) No employer shall, except as otherwise provided in this section, employ any of its employees who is engaged in commerce, or in the production of goods for commerce . . .

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed."

VI

STATEMENT

1. *Circumstances and events which led up to, and brought about, the commencement of the suits.*

The three petitioners and Woodward Iron Company (not a party to the suits) operate fourteen underground iron ore mines in Red Mountain, Jefferson County, Alabama, these being the only such mines in the State and producing all, or substantially all, of Alabama's iron ore. The mining operations were largely done underground and the employees reached their working places by traveling from the mouth or portal of the mines to their working places underground in part by riding on cars provided by the companies, and in part by walking from the point of discharge from the cars. The return trip involved the same process.

Under the long existing and established custom and practice from the very beginning of the iron ore mining industry in Alabama, and the contracts between the bargaining representatives of the miners and the companies since 1934, compensation has not been paid to these employees for the traveling time consumed by them in going from the mouth or portal of the mines to the working places and returning.

At the time the Fair Labor Standards Act became effec-

tive, October 24, 1938, petitioners were operating their iron ore mines under contracts with their employees providing that traveling time was not a part of work time and was not to be compensated for by the companies. On October 6, 1938, before the Act became effective, the International Union of Mine, Mill and Smelter Workers entered into a written contract with the Tennessee Company which defined work time as follows:

> "Section 4.—Hours of work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.
>
> "The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis." (R. 107).

This contract contained a provision that it would remain in effect until terminated or changed by either party upon ten (10) days' written notice to the other. It in fact remained in force and effect until May 5, 1941, when another agreement was made following the opinion of the Administrator.

Prior to the passage of the Act the Sloss Company and the Union, representing its maintenance and production underground employees, entered into and observed contracts containing this same definition of work time. Subsequent to the passage of the Act contracts containing a similar definition of work time were entered into between Sloss and the Union and such contracts remained in effect until May 1, 1941. One of these contracts was executed on September 9, 1939, to become effective on September 16, 1939, and to remain in effect for one (1) year from that date and from year to year thereafter subject to the

right of termination as therein provided (R. 3804, 3805, 3810). This contract was followed by the agreement dated and executed September 11, 1940, to become effective September 16, 1940, and to remain in full force and effect for two (2) years from said date and from year to year thereafter, subject to termination notice as therein provided (R. 152, 154, 159-160). Each of these contracts defined work time as follows:

> "Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period."

The same uniform practice of computing work time as time spent at the face or usual working places was followed between Woodward Iron Company and its underground employees, and contracts containing this definition were in effect both before and after the passage of the Act and up until March 1, 1941.

On only few occasions had the Union included its demands or requests that any of the time spent in traveling to or from the places of work should be on company time, and these requests were that travel time one way be on the company's time and the other way on the employees time (R. 888, 1620, 3751-2, 3866-7).

These requests appear not to have been seriously made since they were abandoned in subsequent negotiations without being mentioned or insisted upon (R. 870, 876-7, 882).

It thus appears that it was the conception of no one when the Fair Labor Standards Act was passed that Congress intended thereby to invalidate the practice and method of computing work time that had prevailed throughout the bituminous coal and iron ore mining industries since time immemorial, or to invalidate, nullify and hold for naught

the obligation of agreements recognized and understood by employer and employee alike and arrived at by the process of collective bargaining.

On July 9, 1940, Earl E. Houck, Director of United Mine Workers of America, and a committee of coal operators wrote a letter to the Administrator in which they discussed the matter of travel time in its relation to the bituminous coal mining industry, in which they requested him to accept the definition of work time in the Appalachian agreement which, they said, embodied "the custom and traditions" of the bituminous coal mining industry, as complying with the provisions of the Fair Labor Standards Act (R. 4715). The definition referred to in this letter is:

> "Section 4.—Hours of work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.
>
> "The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

In the letter, relative to the "face to face" method of computation of work time it is said:

> "There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the places of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense. (R. 4712).

The letter proceeds:

"There are many reasons why the provision as to working time has been set out as provided in this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course closer by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places." (R. 4713).

With respect to the effect of an attempt to adjust wage rates to any new standard of measuring work time, it is said in the letter that such

". . . would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States." (R. 4714).

The cogent reasons advanced in this letter against the disturbance of the "face to face" method of considering and computing work time are equally applicable to the iron ore industry.

On July 27, 1940, on the basis of this letter the Administrator issued a public release in which he said, among other things, that

". . . the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable,"

explaining the "face to face" basis to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal of the mine to the place of work and in returning

therefrom to the portal (R. 4717).

That letter and this release of the Administrator were offered in evidence by the respondents and rejected by the District Court.

On March 23, 1941, almost a year after his foregoing opinion was issued, the Administrator announced what he called the "Modified Portal to Portal Wage-Hour Opinion," in which he expressed a contrary opinion, namely, that "the work day in underground metal inining starts when the miner reports for duty as required at or near the collar of the mine and ends when he reaches the collar at the end of the shift" and also includes "the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out." (R. 76-8).

The District Court agreed with the Administrator both with respect to the underground travel time and as to the time spent on the surface. (R. 568). The Circuit Court of Appeals eliminated the time spent on the surface in obtaining and returning lamps, carbide and tools, and the time spent in checking in and out. (R. 4947, 4841-2).

In concluding his announcement the Administrator said:

> "That because the Division had not heretofore taken a definite stand on the various problems involved, it would not seek to compel the payment of restitution from mine owners who have been operating on a face to face or other bases inconsistent with the principles outlined in the report. This enforcement policy of the Division cannot, however, interfere with the rights of employees or their representatives to sue under Section 16 (b) of the Fair Labor Standards Act." (R. 78).

The Administrator, in his memorandum opposing petitioners' petition for writ of certiorari, in asserting that the "traditional practice" of computing and paying wages on the "face to face" basis had not existed in the industry,

seems to rely on the report of the Wage and Hour Division upon which the opinion was based.

Immediately upon the release of the opinion of the Administrator the Union, representing approximately six thousand underground employees of Tennessee, Sloss, Republic and Woodward, demanded the payment of overtime compensation for all travel time since October 24, 1938, demanded future compliance with the Administrator's opinion, and threatened to institute suits to recover such overtime compensation.

Thereupon the petitioners filed in the District Court their several actions for declaratory judgments, seeking to obtain a declaration by the Court that as to both past and future there was no obligation to consider that portion of the time spent by the underground employees in traveling to and from their usual working places and while not engaged in work or service as work time within the meaning of the Fair Labor Standards Act.

The answers of the respondents denied generally the averments of the petitions and challenged the right of petitioners to a declaratory judgment (R. 248, et. seq.). Later the respondents filed their amended answer wherein they averred:

> "For a further separate defense, these defendants allege that under the Fair Labor Standards Act of 1938 the workweek for the employees of the plaintiff engaged in production of goods for commerce includes all the time when a miner reports for duty as required at or near the collar or portal of the mine and ends when such miner reaches the collar or portal of the mine at the end of the shift, and all the time spent on the surface in obtaining and returning lamps, carbide and tools, and checking in and out." (R. 675).

On May 24, 1941, Philip B. Fleming, Administrator of

the Wage and Hour Division of the United States Department of Labor, filed a motion for leave to intervene, alleging that he was directly and solely responsible for the administration of the Act and that any determination or interpretation of the same would directly affect the administration thereof; that the object of petitioners' petitions was to obtain an interpretation of the term "workweek" contained in Section 7 of the Act which would be contrary to the interpretation placed thereon by him; and that for such reason he had an interest in the cause and sought to assert his claims and defenses presenting both questions of law and fact which were common to the main action. (R. 286).

Thereafter, the intervenor filed answers which, in effect, denied all the material allegations of petitioners' petitions and challenged the right of petitioners to a declaratory judgment and their interpretation of Section 7 of the Act, asserting that the interpretation placed upon it by him in his report and opinion (attached as Exhibit A to petitioners' petitions) was the correct interpretation of said term.

Following the intervention of the Administrator the petitions were amended so as to make the averments thereof, and the prayer, applicable to the Administrator, and to present to the Court for determination and declaratory judgment the question of the correctness of the Administrator's opinion and report and his right to enforce it as against the petitioners.

It clearly appears, therefore, that the issue tendered by the pleadings relates not only to the situation as it existed prior to the institution of the suits but to the future as well.

2. *Tradition, custom and practice of computing work time upon "face to face" basis.*

The undisputed evidence is that from the very dawn of the iron ore mining industry in Alabama travel time has never been included in the computation of work time in that industry. (R. 798, 840-2, 1096-7, 1163-66, 1236, 1276, 1299-1300, 1422, 1484-85, 1551-2, 1632, 1702, 1763-4, 1794, 1864, 2152, 2296, 2300, 2453, 2514, 2598-9, 2671, 2849, 2898-9, 3058-60, 3122-3, 3145, 3162). All of the respondents' witnesses testified that they had never received compensation for the time they spent going to and from their working places. (R. 2458, 2514, 2849, 2898-9, 2964, 3058-60, 3122-3).

The same tradition and custom has existed with respect to both the bituminous coal mining and iron ore mining industries in all of the principal states producing coal and iron ore.

The Administrator under oral commission took the testimony of witnesses who worked in the iron ore mines in the Lake Superior Region. The depositions of these witnesses (R. 4032-4416) were offered in evidence by the petitioners and admitted in evidence over the objection of the respondents. (R. 2221). The testimony of all of these witnesses was to the effect that they had always been compensated on the "face to face" basis. (R. 4081, 4108, 4133-4, 4182, 4204, 4230, 4251-2, 4279, 4310, 4327, 4420, 4424). Typical of the testimony of these witnesses is:

The witness Michael Burck, who has worked on the Vermillion Range in Minnesota since 1924, testified:

"Q. Whether you worked day or night, what hours were you paid for?

"A. Eight.

"Q. Where were you working those eight hours?

"A. I was a miner most of the time, working in—putting out iron ore.

"Q. Well, would it be correct to say that during your

eight hours you were at the face of the mine?

"A. Yes."—(R. 4108).

* * * *

"Q. Now, from the time you started working in '24, until May 1, 1941, what you called the collar-to-collar plan never was in force or operation, was it?

"A. No.

"Q. You didn't have it all during that whole period of time?

"A. No.

"Q. Your time was computed and you received your pay and the company men, or day men, whatever you call them, received their pay on the basis of eight hours, not including traveling time?

"A. Yes.

"Q. That is right, isn't it?

"A. That is right.

"Q. And that was, so far as your experience is concerned, the universal custom during that period of time?

"A. Yes." (R. 4133-4).

The witness Leander Runn, who has worked both on the Mesabi Range and the Vermillion Range in the Lake Superior Region for many years, testified:

"A. Of course, we had to work eight hours at the face.

"Q. Now, if you were working eight hours and getting paid for eight hours, you weren't getting paid for all your time?

"A. You would be bound to travel on your own time both ways." (R. 4182).

John Debeltz, who started underground mining in 1923 or 1924, in the Lake Superior Region, testified:

"A. Well, we were getting paid before May 1st, we were getting paid for, well, what we really were in the place, right at the face.

"Q. So you contend you weren't getting paid for any traveling time?

"A. No." (R. 4204).

Anton Rechek testified as follows:

"Q. It never has been and never was, prior to May

1, 1941, the custom and the practice of the company to pay the men for traveling time?

"A. No." (R. 4230).

Joseph Bovitz, who had worked in the underground iron ore mines in Minnesota since 1907, testified as follows:

"Q. Now, in Minnesota, though, it never has been the practice to pay the miners for travel time, has it?

"A. No.

"Q. And you have known about it for 30 years of your own knowledge?

"A. Yes.

"Q. And you know that the companies never did pay for the travel time up until May 1, 1941. That is correct, is it not?

"A. Yes." (R. 4251-2).

Andrew Sopko, who has had 35 years experience in iron ore mining in the Lake Superior Region, testified as follows:

"Q. And it is true, is it not, that in all those places, all the mines, you have ever worked in, it has never been the practice to pay the men for time spent in traveling to and from the face or place where they worked?

"A. Never been.

"Q. Until May 1, 1941?

"A. Sure, that is how it was.

"Q. Prior to May 1, 1941, in every mine that you have ever worked in.—

"A. Well, you see—

"Q. Wait a minute now; let me finish the question. In every mine that you have ever worked in, you left the top before the shift began?

"A. Yes, sure.

"Q. And you left the bottom after the shift ended?

"A. Yes.

"Q. So that meant that you were traveling both in and out on your own time?

"A. Yes, sir.

"Q. All right. Didn't it get to be later in some of the mines that you worked—didn't you go in on your own time and come out on the company's time?

"A. We never did." (R. 4279).

Florindo Pilotto, who has worked for many years in the underground iron ore mines in Michigan, testified as follows:

"Q. As I understand your testimony, you have never worked in any mine where they paid you for traveling time going to and from the working place?

"A No, they never did.

"Q. Never have?

"A. No.

"Q. In other words, you travel on your own time?

"A. On my own time.

"Q. And you worked on what we call eight hours at the face?

"A. Eight hours; yes." (R. 4310).

George Rupp, who resides at Pueblo, Colorado, and who has been connected with iron ore mining in Colorado since 1929 as General Superintendent and Manager of the Mining Department of the Colorado Fuel & Iron Corporation, testified as follows:

"Q. Well, now, you stated a moment ago that the method of computing the men's time, the underground workers' time, was on a face basis. Do I understand that to mean at the working place down in the mine?

"A. Yes.

"Q. Has that been the practice at the Sunrise mine?

"A. Yes.

"Q. Continuously?

"A. Yes." (R. 4420).

The petitioners presented a number of witnesses by whom they offered to prove a similer invariable custom, practice and contract history in the bituminous coal mines.

(R. 1976, 2047, 2049, 2108, 2110, 2111, 2112, 2114-17, 2132, 2154, 2170, 2178, 2187, 2192, 2195, 2203-4, 2214-15). This proffered evidence was excluded. (R. 2079).

The facts, however, with respect to the bituminous coal mining industry are so generally and commonly known that the Court will take judicial notice of them.

The methods and means of travel by the underground miners from the portal of the mine to the working places and return as described in the Houck letter (R. 4713) do not differ materially from those employed in the iron ore mines, including all the incidents of travel time. Varying distances of the working places from the surface are the same. The one pronounced difference is that the coal mines are gaseous and the iron ore mines are not.

3. *The traditional "face to face" method of computation of work time has for many years prior to the enactment of the Fair Labor Standards Act been recognized by public and quasi public authorities, by statutory enactments, and by administrative rulings on Eight Hour and similar laws.*

(a) A Board of Arbitration, presided over by Rembrandt Peale, on October 25, 1917, made an award, which was approved by the United States Fuel Administrator, in which the work day was defined as follows:

> "An eight hour day means eight hours work at the usual working places of all classes of employees. This shall be exclusive of the time required in reaching such working places in the workings and departing from the same at night." (R. 4694-5).

(b) On March 19, 1920, President Wilson transmitted to the Chairman of the Coal Operators' Scale Committee and to Mr. Lewis, President of the United Mine Workers of America, a copy of a report and award of the Bituminous

Coal Commission, upon the basis of which an agreement was reached, which included the definition of work time last above quoted. (R. 4696, 4759).

(c) On September 18, 1933, on the recommendation of Hugh S. Johnson, NIRA Administrator, President Roosevelt approved the Code of Fair Competition for the Bituminous Coal Industry, which contained the following definition of work time:

> "Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or tonnage or other piece work basis." (R. 4701, 4705).

(d) The President, on September 21, 1933, approved the Appalachian Agreement, in which the work day was defined as follows:

> "Eight hours of labor shall constitute a day's work. The eight hour day means eight hours' work in the mines at the usual working places for all classes of labor exclusive of the lunch period." (R. 4787).

The matters hereinabove immediately referred to are matters of public record of which the court will take judicial notice.

(e) Three states had enacted statutes prescribing a limitation upon permissible hours underground, which statutes employed plain and express language to include travel time —Utah (Chap. 59, Laws of Utah, 1937); Arizona (Sec. 1958, Arizona Revised Codes 1928); Nevada (Sec. 10237, Nevada Compiled Laws). The fact that the Legislatures of these states expressly included travel time is significant.

(f) In 1909 California enacted an eight-hour law applicable to persons employed in underground mines—Stat. 1909, p. 279, c. 181, approved March 10, 1909.

In *Ex Parte Martin*, 106 Pac. 235, the Supreme Court of California sustained the constitutionality of this law, and held that the eight-hour provision included work at the face of the mine and excluded travel time. The court said:

> "Giving to the words of the act their ordinary and reasonable meaning, the limitation of time is to be construed as referring to the time when men are actually engaged in work, not when they are going to and from their work. There is nothing in the language of the act which would justify a more restricted interpretation."

After the California statute was passed a number of other states enacted statutes of similar import, and presumably adopted the interpretation of the Supreme Court of California.

In our investigation we have not discovered any case in which any such statute has been construed differently, with the exception of the case of *Butte Miners Union No. 1 v. Anaconda Copper Mining Co.* (1941) 112 Mont. 418, 118 Pac. (2d) 148, in which the Supreme Court of Montana, by a divided Court, held that the travel time of miners working underground in copper mines should be included as a part of the work day. The Court based its judgment entirely upon the Administrator's modified portal to portal opinion, on some theory of avoiding conflict in administration and enforcement. The dissenting opinion reviewed the history of the legislation on the subject and emphasized that the Legislature of Montana had on a number of occasions pronounced the policy of the state by refusing to amend the statute so as to expressly provide that all underground time should constitute a work day. The forcible statement is made in the dissenting opinion that,

> ". . . the courts can not do by construction what the Legislature refused to do by amendment."

4. *Rulings and administrative interpretations that eight hour laws and like statutes apply only to effective work.*

Rulings of the Comptroller General on November 11, 1929 (R. 4661), on June 18, 1935 (R. 4662), and on October 28, 1937 (R. 4669).

Ruling of the Comptroller of the Treasury on June 12, 1921 (R. 4658).

Opinions of the Attorney General on October 11, 1906 (R. 4646) and on May 11, 1908 (4654).

5. *Recognition of "face to face" method of wage computation by public and quasi public authorities and by administration rulings with respect to the Fair Labor Standards Act and other acts of similar purport since the enactment of the Fair Labor Standards Act.*

(a) Petitioners and their employees and the employers and employees in the iron ore mining industry throughout the United States continued after the Fair Labor Standards Act became effective to compute work time on the "face to face" basis. Some of the latter agreements were executed on September 11, 1940, December 23, 1940, and March 17, 1941. (R. 105, 152, 166, 3737, 3804, 3916, 3939).

(b) On July 27, 1940, the Administrator approved the "face to face" policy of wage computation for the bituminous coal mining industry. (R. 4717). The Administrator has never changed or departed from this ruling.

(c) The iron ore mining industry was induced or allowed by the Administrator to continue the traditional method of computation of work time until the modified portal to portal opinion was released on March 13, 1941. In that release the Administrator stated that because the

Division had not taken a definite stand it would not compel the payment of restitution from mine owners who had been operating on the "face to face" basis. (R. 76, p. 9, supra).

(d) The coal mining industry has continued until very recently to compute wages on the "face to face" basis either under existing contracts or pursuant to the directives of public officials.

(e) Since the decision of the Circuit Court of Appeals significant occurrences have happened which are of such common knowledge as that the Court will take judicial notice of them:

(1) No demand for portal to portal travel time was made in the 1941 negotiations between the International Policy Committee of the United Mine Workers of America and the coal operators.

(2) The wage agreement executed between the Union and the operators in 1941 expired on March 31, 1943, and negotiations for a new contract began on March 10, 1943.

(3) The original decision in this cause by the Circuit Court of Appeals was rendered on March 16, 1943.

(4) Following the decision, on March 19, 1943, the Union amended its demand with respect to hours of work from the "face to face" basis to "portal to portal." This amended demand was presented by John L. Lewis, President of the Union, who stated:

> "The Mine Workers desire to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines."

(5) On March 16, 1943, Mr. Lewis, appearing as a witness before the Senate Committee investigating the National Defense Program, said:

"I wonder what you suggest, Senator, you having a very alert, capable mind on these things, in the light of the decision of the Fifth Circuit Court of Appeals on the portal-to-portal issue, what the mine workers should do. The Court says that we cannot make a contract and contract away the rights by the statute. I am judicially estopped from making an agreement that does not comply with the mandate of the Court."

(6) On June 18, 1943, the National War Labor Board, in its directive, denied the demand of the Union for the establishment of "portal to portal" for starting and quitting time and directed that the contracts which expired on March 31, 1943 (with certain amendments not relating to travel time), remain in effect until March 31, 1945, thus expressly providing for the carrying forward of the traditional agreements for the computation and payment of wages on the "face to face" basis.

(f) The increase in wages referable to travel time, as demanded by the Union, involved a general increase to each and all of the miners, regardless of the amount of time spent by the individual in going from the portal to the working place and in returning, and regardless of whether or not any time was so spent. The compensation thus demanded was not for compensation on the statutory basis or on the basis of the decision of the Circuit Court of Appeals, and demonstrates the impracticability of the application of the "portal to portal" basis of computation of work time. The National War Labor Board in its opinion called attention to this fact in concluding that in the form in which compensation for travel time was demanded it amounted only to a general increase in wages, which the Board refused to grant.

The character of the demands made and the method in which they were handled by the War Labor Board demonstrates the impracticability of applying the "portal to por-

tal" basis of compensation to underground mining operations in which the distances of the working places vary so greatly, and that the issue is one which lends itself peculiarly to the processes of collective bargaining. The Houck letter and the dissenting opinion of Judge Sibley of the Circuit Court of Appeals are prophetic of the chaos and confusion which would result from holding that travel time is work time within the meaning of the Fair Labor Standards Act.

The Congress is presumed to have known the prevailing conditions at the time of the passage of the Act and must be presumed by the use of the word "workweek," undefined, not to have intended to nullify bona fide contracts fairly arrived at through the processes of collective bargaining.

6. *Legislative history of the Fair Labor Standards Act.*

(1) The National Labor Relations Act on the one hand and the Fair Labor Standards Act on the other sprung from the National Industrial Recovery Act enacted by Congress on June 16, 1933, and declared unconstitutional by this Court on May 27, 1935. The former Act represents a reenactment of that phase of NIRA designed for the protection and maintenance of the rights of collective bargaining, and the latter to fix and regulate minimum wages and maximum hours.

The approved Code of Fair Competition for the Bituminous Coal Industry under the National Industrial Recovery Act, signed by the President on September 18, 1933, shows the administrative conception and definition of work time under that Act, which must have been in the mind of Congress in the use of the word "workweek" in the Fair Labor Standards Act. This Code provides:

"Seven hours of labor shall constitute a day's work and this means seven hours' work at the usual working

places for all classes of labor exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece work basis." (R. 4700-6).

(2) Representative Keller, a member of the Conference Committee, in debate preceding the final passage of the Fair Labor Standards Act, June 14, 1938, said:

"This bill eliminates the defects and preserves the best features of the National Industrial Recovery Act. In doing so a better procedure is provided, so that no rights may be affected without an opportunity to be heard. NRA put down a floor for wages and a ceiling to hours of work." (Vol. 83, Congressional Record, Part 8, p. 9264, 75th Congress, Third Session, June, 1938).

(3) The Senate Committee in paragraph II of Report of July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884).

(4) On June 2-22, 1937, joint hearings on the Fair Labor Standards Act were held before the Committee on Education and Labor, United States Senate, and the Committee of Labor, House of Representatives. The following excerpts from the Joint Hearings are quoted:

"MR. LEWIS: * * * My recommendation as to rate of pay is a minimum of 40 cents per hour. As to hours of work, the standard in my opinion should be 5 days of

7 hours each or 35 hours per week, with authority granted to the Board to expand to a 40-hour maximum, or to reduce to a 30-hour maximum * * *." (p. 272).

"SENATOR LaFOLLETTE: * * * as I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the Board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organizations." (p. 280).

"MR. LEWIS: * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry, and order a modification thereof. I think the power of the Board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of Section 5 now. I see a drift towards the complete fixation of wages in all industry by governmental action." (pp. 281-2).

"THE CHAIRMAN: As I understand your position, boiled down, with reference to the minimum wage — I want to be sure — it is that you favor a minimum wage law written in such a way that it will preserve to the utmost the right of bargaining between employers and employees, but which will at the same time raise the low, substandard condition of millions of people, those who have been living in that sphere and have not as yet been able to elevate themselves either by their own bargaining or by collectively bargaining?

"MR. LEWIS: That is correct, Senator." (p. 307).

(5) During the Senate debate on the bill on July 29, 1937, the following statements were made:

"MR. WALSH: Next does the bill affect collective bargaining agreements already made or hereafter to be made between employers and employees?

"MR. BLACK: It does not.

"MR. WALSH: There is one exception to that, is there not? The bill does not affect collective bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"MR. BLACK: That is correct.

"MR. WALSH: But if a collective bargaining agreement had been entered into at 36 cents per hour wages, the Board would have jurisdiction to set that agreement aside and to fix, if the facts warranted, a minimum wage of 40 cents?

"MR. BLACK: The Board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the Board would be very reluctant, indeed, to attempt to interfere with a bona fide agreement made between employers and employees." (Congressional Record, Vol. 81, p. 7650).

7. *Mining Practices of Petitioners.*

As hereinabove stated, substantially all iron ore mined underground in Alabama is produced by the three petitioners and Woodward Iron Company (not a party but whose operations, customs and practices are shown by the testimony). The vein of ore which they all mine is in or near Red Mountain near Birmingham, Alabama, and outcrops generally at the top of the mountain and pitches downward at an angle of approximately 25 to 30 degrees until the basin is approached, when it begins to level out. The vein is entered by means of a slope which is driven along the ore vein. At intervals, openings called "headings" are driven off on both sides of the slope at right angles thereto and the ore is mined by drilling and shooting into the ore between the headings. The working places where

the ore is taken from the seam between headings are called "stopes." While ore is mined and removed in driving the slope and the headings, this work is development work for the purpose of gaining access to the main body of the ore between the headings. (R. 758-766).

The place where this ore is mined, principally in the stopes, is called the "face" of the ore, and the term "face" is applied to the usual working place of the miners whose productive work is directly involved in mining the ore and moving it to the haulageways in the headings. The point where it is delivered at the haulageway is called the "knuck." The working place of all the production miners extends from the knuck to the face from which the ore is removed, and this working place of these men is referred to generally as the "face." From the early beginning of the underground mining industry in Alabama the worktime of the production employees, by established custom and usage, commenced at the "face," and their compensation was computed upon the basis of work done there, exclusive of the time spent in going to and from the "face," hence the term "face-to-face." (R. 798, 840, 1096, 1864).

Obviously, the progress of the mining operations requires the extension of the slope, and the driving of more headings. The new working place, with such progress, becomes farther from the opening or mouth of the mine—called in the Administrator's bulletin and papers "portal." Of necessity, the distances of the working places of the mining crews from the portal vary. Some of the working places are very near the mouth of the mine, while others are at great distances therefrom.

The underground employees are divided into two classes: (1) The production men, whose work is peculiarly connected with the actual mining operations, and whose work is at the "face" as above described; and (2) main-

tenance and service men who maintain the ways, tracks, pipes, electrical equipment, etc., in the mine. The working places of the maintenance and service men are underground wherever their services are needed. Their working time begins at the point underground where they are first required to be at the beginning of the shift.

The evidence shows without dispute that all maintenance and service men were paid on a time basis and that the computation of their wage has never been on a production or tonnage basis. Since 1934 their compensation has been at an hourly rate. (R. 1588, 1847, 965).

In the Sloss mines approximately thirty-six per cent of the total number of underground employees are service and maintenance workers (R. 1441); in the Republic mines approximately forty-six per cent. (R. 1848), and in the mines of the Tennessee Company approximately sixty per cent (R. 758).

In the early history of ore mining, and before the slopes were extended substantial distances from the surface, manways were provided parallel to, and a short distance from, the slopes for the men to enter the mine and walk to their places of work. As the mine workings were extended cars or "skips" were provided to transport the underground employees to their places of work, or to a common or central loading station underground from which they walked to their places of work at the beginning of the shift, and to which they returned at the end of the shift to board the cars for return to the surface. Several cars were coupled together to form a trip (called a "mantrip") and several trips of cars were used in transporting the men, leaving the surface or portal at regular intervals before the beginning of a shift and leaving the inside terminus a few minutes after the shift ended.

There was a regular time prescribed by the company for

the men to begin work at their underground working places and a prescribed time when work was to stop. The mantrips were scheduled so as to permit the miners to reach their places of work at the beginning of the shift and to leave their places of work at the end of the shift for return to the surface. The schedules were designed and arranged as far as possible to enable the men working in the more distant places to catch the earlier shift, and those whose travel distances were less to catch later trips according to the distance of their working places from the surface and from the loading stations.

The petitioners provided bath houses on the surface equipped with lockers for use by the men in changing their clothes at the beginning and ending of the shifts. The use of the bath houses was optional with the men. (R. 778, 1410).

The general practice was that all of the men took with them into the mines a small light, in some mines electric and in others carbide. This light was attached to the front of their caps. Occasionally small tools were picked up by some of the production men, as a matter of convenience to themselves, at or near the top or en route to the face where work commenced. The percentage of the men who did this was very small. In the main and as a rule, all the tools with which the men worked were taken by company men on company time to or near the place where they might be needed; and always all of the heavier tools and mining equipment were hauled to or near the working place by service crews who performed this service for the company on company time. (R. 1494, 1419, 1311).

8. *History of Negotiations and Agreements between the Union and the Sloss Company.*

The International Union of Mine, Mill and Smelter

Workers organized the miners at the red ore mines of the company in 1933. In the fall and winter of that year a few meetings between the company representatives and the mine committee were held but no agreement was entered into for that year.

In 1934 an instrument dated April 13, in the form of a proposal for a contract was presented by the Union and the company. The proposal contained a number of demands among which was the demand that the miners enter the mines on their own time and leave on the company's time. (R. 3751) The record shows that a similar proposal was presented to the other petitioners and Woodward Iron Company. On May 4, 1934, the Union called a strike in which all the miners of all four companies struck. The matter of travel time was not the cause of the strike. (R. 1326-7). Nor was that matter a subject of discussion at meetings during the strike. (R. 1328). The strike was later settled when a representative of the United States Department of Labor came to Birmingham and held meetings between representatives of the Union and of the several companies interested. The settlement agreement was evidenced by letters addressed by the companies to the Secretary of Labor, in which letters the matter of traveling time was not mentioned. (R. 4024-6). Following this agreement the miners returned to work and the matter of travel time was treated by the companies, by the men, and by the Union in accordance with the established custom and practice, namely, under the established custom and practice of computing work time on the face-to-face basis. (R. 1333).

In 1935 the Union again presented a proposed agreement, one of the provisions of which was that the employees enter the mines on their own time and come out of the mines on the company's time. (R. 3755). The negotiations following this proposal culminated in a letter directed to the District President of the Union, and other representatives

of the Sloss ore mine employees, which contained in effect the agreement of the previous year. (R. 3760). Following this letter computation of working time was continued on the face-to-face basis. (R. 1347).

In 1936 the Union's proposal for a contract for the ensuing year contained a provision for an eight-hour day and a five-day week and defining the eight-hour day as follows:

> "The eight-hour day means eight hours in or about the mines, at the usual working places for all classes of work (other than those excepted from this agreement) exclusive of the lunch period, whether they be paid by the day or paid by tonnage * * *." (R. 1356, 3768).

The negotiations for that year closed with an agreement which contained the provision that:

> "An eight-hour day and five days per week per employee shall prevail, exclusive of the lunch period. The eight-hour day means eight hours of work in the usual working places, exclusive of the lunch period."

Negotiations in 1937 were participated in on behalf of the Union by Mr. Reid Robinson, National President of the International Union of Mine, Mill and Smelter Workers, and Mr. Barco, representing the United States Department of Labor. The negotiations culminated in an agreement which contained the same provisions with respect to travel time as that contained in the contract for the year before. (R. 3782). Pursuant to this provision the face-to-face basis of computing work time was continued. (R. 375-6).

The negotiations for the year 1938 resulted in the extension of the 1937 agreement for a period of one year.

The Union's proposal for a contract for the year 1939 and the contract which was subsequently signed for that year

contained the same provisions with reference to travel time as had the contracts for the two previous years. (R. 3804). This contract, as hereinabove pointed out, was executed almost one year after the effective date of the Fair Labor Standards Act and was to expire practically two years after such effective date.

The Union's proposal for a contract in 1940 contained a provision including travel time in the work day. (R. 3815). After negotiations, however, an agreement was arrived at which embodied the same provision with respect to travel time as that contained in the contracts for the three preceding years. (R. 152). This agreement was executed on September 11, 1940, to become effective on September 16, 1940, and to remain in force and effect for two years from said date, subject to the right of termination as therein provided. On September 12, 1940, the District representative of the Union addressed a letter to the General Manager of the Sloss in which he stated that the contract which had been signed the day before,

> "does not preclude the right of the organization to continue in its request for pay for travel time spent by the employees in going to and from their working places, nor does it in any way waive the contentions of the Local Union that said travel time should be treated as hours worked."

The letter closes with the paragraph:

> "As you know, this matter of travel time is now before the Wage and Hour Division of the U. S. Department of Labor and the decision is still pending." (R. 1470, 3837),

The company's reply to this letter, dated September 14, 1940, stated:

> "As you of course realize, the agreement was arrived at through the process of collective bargaining and was

signed by both parties in good faith after fully threshing out the matter you now refer to.

"The company expects to carry out the agreement and believes that the union will carry it out as made." (R. 3838).

VII

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals erred in holding that the question whether travel time should be included in the computation of working time is a question of fact.

2. The Circuit Court of Appeals erred in treating the finding or opinion of the District Court that travel time is work time as a finding of fact.

3. The Circuit Court of Appeals erred in sustaining the finding of the District Court that there was no custom not to include travel time in the computation of working time, though conceding arguendo "that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel time."

4. The Circuit Court of Appeals erred in holding that it was the intention of Congress in passing the Fair Labor Standards Act to regulate the environment and physical conditions of work and that travel time is a part of work time because of its discomforts and hazards.

5. The Circuit Court of Appeals erred in affirming the decision of the District Court that travel time was to be computed in determining working time.

6. The Circuit Court of Appeals erred in setting aside agreements made through the process of collective bargaining.

7. The Circuit Court of Appeals erred in its suggestion that the agreements set aside may not have been voluntary, because of the lack of bargaining equality.

8. The Circuit Court of Appeals erred in disregarding the exclusion by the District Court of relevant evidence.

SUMMARY OF THE ARGUMENT

(1) In interpreting the term "workweek" as used in the Fair Labor Standards Act, the intention of Congress must be arrived at. In finding that intent consideration must be given to:

(a) The reasonable standards in the industry to which the Act is sought to be applied, as evidenced by prevailing working conditions, and by customs and practices and bona fide contracts or arrangements between employers and employees by which work time is defined;

(b) Reasonable standards in other industries in which working conditions and customs and practices and bona fide contracts or arrangements between employers and employees are essentially the same;

(c) The sense in which the same term, or terms of the same import, have been used in prior Federal statutes;

(d) The rulings or opinions of administrative officers in construing terms of like import in prior Federal statutes; and

(e) The generally accepted meaning of the same term, or terms of the same import, as evidenced by the use of such terms in state statutes relating to hours of work, the judicial interpretation of such terms, and the custom and practice thereunder of those to whom they apply.

(2) The purpose of the Fair Labor Standards Act was

to fix a minimum wage and maximum hours of work. It was not the intention of Congress in its enactment to restrict freedom of contract beyond the purpose of preventing unfair competition in commerce. It did not intend to restrict the rights of collective bargaining, which it has shown a zealous and consistent purpose to preserve and maintain.

The constitutional basis of the Fair Labor Standards Act is to promote the flow of interstate commerce and to prevent the unfair competition which is created by employers who pay their workers less than a living wage.

(3) It was not the purpose of the Fair Labor Standards Act to eliminate labor conditions detrimental to the general welfare of the workers.

The Act is one of economic import only. It is neither a health measure nor a police measure.

(4) There exists a justiciable controversy between petitioners and respondents (including the Administrator, Intervener) with reference to the construction of Section 7 of the Fair Labor Standards Act for the time subsequent to May 1, 1941.

(5) The undisputed evidence established the existence, before, and at the time of, the enactment of the Fair Labor Standards Act of agreements between employers and employees throughout the iron ore mining industry under the terms of which work time was computed on the "face to face" basis. It, therefore, follows that the question of the validity of these contracts and the effect to be given to them is a question of law for the Court and not a question of fact to be decided by a jury or fact finding tribunal.

ARGUMENT

POINT I

IN INTERPRETING THE TERM "WORKWEEK" AS USED IN THE FAIR LABOR STANDARDS ACT, THE INTENTION OF CONGRESS MUST BE ARRIVED AT. IN FINDING THAT INTENT CONSIDERATION MUST BE GIVEN TO:

(a) *The reasonable standards in the industry to which the Act is sought to be applied, as evidenced by prevailing working conditions, and by customs and practices and bona fide contracts or arrangements between employers and employees by which work time is defined.*

The Fair Labor Standards Act was enacted for nation-wide application in all of its provisions. Section 7, prescribing the maximum hours of work per week and requiring the payment of overtime for work performed in excess of those hours, was intended to apply to all industries, with all the varying conditions and circumstances under which the work is performed.

The constitutional basis of the Act is to prevent unfair competition within an industry which is brought about by sweat shop conditions, including long hours of work at less than a living wage. In the light of the purposes of the Act it must be presumed that the Congress in its enactment, and particularly in the use of the word "workweek," totally undefined, viewed the prevailing working conditions, the customs and practices and bona fide contracts or arrangements between employers and employees by which work time is defined. It intended that the Act be construed consistently with established and existing practices. It did not intend to revolutionize conditions in

industry which had been established by collective bargaining. Had the Congress intended to radically change such standards it could and would have employed adequate definitive language to clearly express that intent.

The principle that the Act was intended to be applied on an industry basis is recognized and advanced by the Administrator in his Bulletins and Releases addressed to the question of the interpretation of the word "workweek" in its application to underground mining in the coal and iron ore industries. This rule of interpretation cannot be questioned.

In the case of *United States v. Turner Turpentine Company* (C. C. A. 5th, 1940) 111 F. (2d) 400, the question was whether the production of gum and its processing into turpentine and resin was "agricultural labor" within the meaning of the Social Security Act. The opinion of the Court cites the statutes of several states which together produce approximately 90 per cent of the gum turpentine and gum resin produced in the United States. Federal acts containing similar definitions were cited. In the opinion the Court said:

> "It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor,' it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. *This does not mean, of course, that a mere local custom which is in the face of the meaning of a general*

term used in an act, may be read into the act to vary its terms... It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to." (Emphasis supplied).

Cf Maddox v. Jones (District Ala. 1941) 42 F. Supp. 35.

(b) *Reasonable standards in other industries in which working conditions and customs and practices and bona fide contracts or arrangements between employers and employees are essentially the same.*

In enacting the Fair Labor Standards Act and in using the undefined term "workweek," it is presumed that the Congress was familiar with the standards in all industries to which the Act is sought to be applied.

The record shows without dispute that the same customs and practices and contracts between employers and employees in the great bituminous coal industry, which employs a half million miners, were the same as those in the iron ore mining industry with respect to the definition of work time. Certainly, it cannot be presumed that the Congress did not give due and serious consideration to those customs and practices in both industries when it enacted the Fair Labor Standards Act and without defining the word "workweek." Notwithstanding, we now have by interpretation of the Administrator the anomalous situation of having the term "workweek" include travel time in the ore mines and exclude travel time in the coal mines. This situation is particularly emphasized by the operations of petitioners and Woodward Iron Company. Each of these companies operates in connection with its business both iron ore mines and coal mines, a short distance apart. Both

operations are essential in the production of the material which they process and sell in the market in interstate commerce. The contracts with the ore miners and the coal miners, insofar as the definition of work time is concerned, are the same. Both exclude travel time. The conditions of travel are substantially the same in the two industries. The mode of travel is the same. All of the incidents of travel between the mouth of the mines to the working places and return are essentially the same. Whatever hazards attend travel are the same, with the exception that the coal mines are gaseous and the ore mines are not.

If the Congress intended, as the Administrator has found, that travel time in coal mines was not work time, does it not follow that the Congress also intended a like result in the iron ore mining industry?

(c) *The sense in which the same term, or terms of the same import, have been used in prior Federal statutes evidences the intent of the Congress in leaving the word "workweek" undefined in the Fair Labor Standards Act.*

We have hereinabove called attention to the pertinent provision of the Code of Fair Competition for the Bituminous Coal Industry, as approved by the President on September 18, 1933. The Code contains the provision:

> "Seven hours of labor shall constitute a day's work and this means seven hours at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece work basis."

Congress must be deemed to have intended that work time to be included in the workweek under the Fair Labor Standards Act should be given the same meaning as was prescribed by those in charge of the administration of the

National Industrial Recovery Act, under which the Bituminous Coal Code was adopted.

The policy of the National Industrial Recovery Act and of the Fair Labor Standards Act are in many aspects the same. In those aspects they evidence the same policy. They are kindred acts. The similarity of the provisions of the sections of the Bituminous Coal Code and the pertinent provisions of the Fair Labor Standards Act command notice. The word "employ" is used in both, and with the same meaning. In the Code we find a definition of the word "workday" as meaning the prescribed hours of work at the usual working place, exclusive of the lunch period. In the Fair Labor Standards Act we find the word "workweek" undefined.

In approving and giving effect to the Code the President recognized the established custom and practice with respect to the computation of work time. In using the term "workweek" in the Fair Labor Standards Act the Congress is presumed to have intended that that term be given that interpretation which conforms to the definition of the seven-hour day in the Code and to the uniform customs, practices and contracts by which work time is defined.

It is a familiar and well established rule that, where a statute that has been construed by the Courts has been reenacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless a different intention is indicated.

Edwards v. Wabash Ry. Co. (C. C. A. 2nd, 1920) 264 Fed. 610; *McDonald v. Hovey,* 110 U. S. 619, 28 L. Ed. 269; *Marshall v. Commissioner of Revenue* (C. C. A. 3rd, 1940) 111 F. (2d) 935; *Deming v. United States* (C. C. A., D. C.), 37 F. (2d) 818; *State, ex rel. Norfolk Beet Sugar Co. v. Moore,* 50 Neb. 88, 61 Am. St. Rep. 538;

Ross v. Miller (N. J. 1935) 178 Atl. 771; *Gilmore v. Preferred Accident Ins. Co.* 283 N. Y. 92, 27 N. E. (2d) 515, 129 A. L. R. 986; *Reiche v. Smythe,* 13 Wallace 162, *Appel v. Mellon,* 33 F. (2d) 805; *Marx v. U. S.* 161 U. S. 297, 40 L. Ed. 706; *Purtell v. Philadelphia and Reading Coal and Iron Company,* 256 Ill. 110, 99 N. E. 899, Ann. Cas. 1913, Sec. 335, 43 L. R. A. (N.S.) 193; *Great Northern Ry. Co. v. Ward Co.* (N.D.) 208 N. W. 768.

(d) The foregoing authorities are equally applicable in cases where a prior statute has received interpretation by any administrative or executive department of the Government.

(e) The generally accepted meaning of the same term, or terms of the same import, as evidenced by the use of such terms in state statutes relating to hours of work, the judicial interpretation of such terms, and the custom and practice thereunder of those to whom they apply are persuasive in arriving at the intent of the Congress in the use of the word "workweek" in the Fair Labor Standards Act.

We have in our Statement called attention to the California eight-hour law relating to hours of work in underground mines and to its interpretation in the case of *Ex Parte Martin,* 106 Pac. 238, and to the fact that after the enactment of the California statute a number of other states enacted similar statutes.

It is significant that the statutes of Utah, Arizona and Nevada provide for a maximum period of employment of eight hours, and in clear and unmistakable langauge provided that the travel time from surface back to surface is included within those hours. The express language employed in these statutes evidences the conception that travel time would be excluded from work time unless specifically included in the legislative enactment.

POINT II

THE PURPOSE OF THE FAIR LABOR STANDARDS ACT WAS TO FIX THE MINIMUM WAGE AND MAXIMUM HOURS OF WORK. IT WAS NOT THE INTENTION OF CONGRESS IN ITS ENACTMENT TO RESTRICT FREEDOM OF CONTRACT BEYOND THE PURPOSE OF PREVENTING UNFAIR COMPETITION IN COMMERCE. IT DID NOT INTEND TO RESTRICT THE RIGHTS OF COLLECTIVE BARGAINING WHICH IT HAS SHOWN A ZEALOUS AND CONSISTENT PURPOSE TO PRESERVE AND MAINTAIN.

The Act relates only to the minimum wage and maximum hours. The record shows that the compensation paid to the employees of petitioners greatly exceeded the minimum prescribed in the Act. Congress did not intend to restrict the processes of collective bargaining so long as the minimum wage is paid. Affirmative evidence of this appears in the report of the Senate Committee which considered this legislation prior to its passage. Excerpts from these debates appear in the Statement appearing hereinabove. The question of the effect of this legislation upon the process of collective bargaining was expressly brought up in the Committee by Senator Walsh when he inquired as to whether or not the legislation would effect collective bargaining agreements already made or thereafter to be made and was told that it would not.

The effect of the decision in the Circuit Court of Appeals is to nullify bona fide contracts arrived at by collective bargaining in which the minimum wage far exceeds the minimum prescribed in the Act. This interpretation of the Act is counter to the purpose of the Act, as is evidenced by the comments and expressions of the legislators in committee when considering this phase of the Act.

In *Williams v. Terminal Company*, 315 U. S. 386, this Court held that the employer and employee were free to contract and agree that tips constituted wages under the provisions of the Act.

In *Walling v. Belo Corporation*, 316 U. S. 624, this Court recognized that employer and employee must be left free to contract under the provisions of the Act "because the employment relationships to which the Act would apply were so various and unpredictable." In the course of its opinion the Court further said that it is well to afford the fullest scope to agreements between parties affected by the Act.

POINT III

IT WAS NOT THE PURPOSE OF THE FAIR LABOR STANDARDS ACT TO ELIMINATE LABOR CONDITIONS DETRIMENTAL TO THE GENERAL WELFARE OF THE WORKERS.

The holding of both the District Court and the Circuit Court of Appeals that the purpose of the Act was to "eliminate labor conditions detrimental to the welfare of the workers" and to "rectify abuses growing out of the dangers and discomforts incidental to underground iron ore miners" is unsound. The purpose of the act was to regulate wages and hours. It was intended thereby to promote the general welfare of the workers only by improving their standards of living in so far as the matter of wages and hours might affect it. The Act does not deal with health, safety, hazards or labor environment.

U. S. vs. F. W. Darby Lumber Co., 61 Sup. Ct. Rep. 451-63.

Fleming vs. Belo Corporation, (5th C. C. A.) 121 Fed.

Rep. (2d) 207, affirmed by this Court June 3, 1942, 66 Sup. Ct. Rep. 1283.

The Fair Labor Standards Act was not designed to accomplish the same ends as the Hours of Service Act (Act of March 4, 1907, c. 2939, 34 Stat. 1415) and similar laws passed by a number of the States. The purpose of the Federal Hours of Service Act was "to prevent the dangers which necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those entrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them unattentive to duty or incapable of discharging the responsible labors of their position."

Atchison, etc., R. Co. vs. U. S. (1917), 224 U. S. 336, 378 S. Ct. 535, 61 L. Ed. 1175.

The Hours of Service Act places an absolute limit upon the hours of permissible service in the occupations which it affects. Its purpose and design is entirely different from the Fair Labor Standards Act. The Fair Labor Standards Act does not limit the hours of service. It merely requires the payment of time and one-half for time worked in excess of the prescribed workweek.

POINT IV

THERE EXISTS A JUSTICIABLE CONTROVERSY BETWEEN PETITIONERS AND RESPONDENTS (INCLUDING THE ADMINISTRATOR, INTERVENER) WITH REFERENCE TO THE CONSTRUCTION OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT FOR THE TIME SUBSEQUENT TO MAY 1, 1941.

The circumstances immediately leading up to the filing of these suits and the pleadings of all the parties clearly show that a justiciable controversy is presented applicable as well to the period after May 1, 1941 as to the period prior to that date. The Administrator's opinion announcing the portal-to-portal policy as applicable to the metal mining industry was followed by demands of the employees of the Petitioners for overtime compensation for travel time, and by threats to sue therefor. The Administrator in his pronouncement stated that his enforcement policy would not relate to the past. Consequently, his interest was necessarily confined to the future.

The Petitioners' petitions ask for an interpretation of Section 7 of the Act and for a declaration that the time spent by the underground employees in traveling from the portal to the working place and returning was not work time to be included in the workweek. Respondents in their answers allege their interpretation of the Act which is identical with the opinion of the Administrator.

The Administrator filed a motion to intervene, alleging that he was directly and solely responsible for the administration of the Act and that any interpretation would directly affect the administration thereof and that, for that reason, he was interested in the cause. His motion was granted. He thereafter filed an answer setting up his interpretation of the act as the proper interpretation.

It appears conclusively from these circumstances that the pleadings require an interpretation by which the Petitioners may be guided in the future conduct of their business. The transition made by Petitioners to portal to portal, at the expense of decreased production was made because of the great hazard which might result from a violation of the Administrator's enforcement opinion and order.

POINT V

THE UNDISPUTED EVIDENCE ESTABLISHED THE EXISTENCE BEFORE, AND AT THE TIME OF, THE ENACTMENT OF THE FAIR LABOR STANDARDS ACT OF AGREEMENTS BETWEEN EMPLOYERS AND EMPLOYEES THROUGHOUT THE IRON ORE MINING INDUSTRY UNDER THE TERMS OF WHICH WORK TIME WAS COMPUTED ON THE "FACE TO FACE" BASIS. IT, THEREFORE, FOLLOWS THAT THE QUESTION OF THE VALIDITY OF THESE CONTRACTS AND THE EFFECT TO BE GIVEN TO THEM IS A QUESTION OF LAW FOR THE COURT AND NOT A QUESTION OF FACT TO BE DECIDED BY A JURY OR FACT FINDING TRIBUNAL.

The undisputed testimony in the record shows that, before and at the time of the enactment of the Act throughout the iron ore mining industry in the United States the clearly understood agreements between employers and employees were that travel time was not included in work time for which compensation was payable. The "face to face" policy was universal in the industry. We submit that under these circumstances any finding or opinion that travel time was included in work time, is a conclusion of law and not a finding of fact. When the evidence is undisputed as to the contractual relationship and the terms of the contract, the

question of the validity of the agreements is a question of law for the Court.

It is well established that ultimate findings of fact are to be distinguished from findings of primary, evidentiary or circumstantial facts. An ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact which is subject to review and on such review the appellate court may substitute its judgment for that of the lower court. Cf. *Helvering c. Tex-Penn Oil Co.*, 300 U. S. 481, 491, as well as authorities supra.

Not only may the Appellate Court review findings of fact which are not supported by evidence, but it is also entitled to disregard findings of fact that are based upon fallacious reasoning or data. No presumption of correctness attaches to a finding or decision of a regulatory body or administrative officer if the method of determination is essentially wrong. *United States v. Wyckoff-Creosoting Co.*, 271 U. S. 263; *Northern Pac. Ry. Co. v. Department of Public Works*, 268 U. S. 39; *Duffin v. Lucas*, 55 F. (2d) 786; *Wilson Coal Land Co. v. Commissioner*, 87 F. (2d) 185.

If it be treated as a question of fact and left to the determination in each individual case by a jury or fact finding tribunal, conflicting decisions upon the same testimony would inevitably result. Varying decisions based upon the same facts would tend to increase "unfair competition in commerce." Such chaos and confusion can be avoided only by the holding that the validity and effect of the agreements are matters of law for the Court. As said in the dissenting opinion in the Circuit Court of Appeals:

> "There is nothing in the Act to outlaw agreements that travel time in getting to and from the agreed place of work is not work time."

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed and a judgment rendered herein declaring that it was the intention of the Congress, in the use of the word "workweek" as it appears in Section 7, Fair Labor Standards Act, in its application to Petitioner's employees, not to require portal to portal travel time to be included in the computation of the workweek prescribed by Section 7 of the Act.

E. L. ALL,

S. M. BRONAUGH,

WILLIAM B. WHITE,

Attorneys for Petitioner,
Sloss-Sheffield Steel & Iron Co.

APPENDIX

LETTER FROM UNITED MINE WORKERS OF AMERICA AND COAL OPERATORS TO ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

1617 Pennsylvania Boulevard,
Philadelphia, Pa., July 9, 1940.

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage and Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association concerning the application of the Fair Labor Standards Act of the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the

Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter of the Southern Appalachian Coal Operators Association, Knoxville, Tenn.; Charles O'Neill, President of United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice-President of Monroe Coal Mining Coming; Frederick H. Knight, Counsel for Monroe Coal Mining Company; W. L. Robinson, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the questions of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid by the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement cov-

ering its own territory, subject, however to the provisions that it must include within it all of the provisions of the Appalachian Agreement.

The mines in the Appalachian region produce 70 per cent of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as a basic agreement upon which the district agreements of the remaining 30 per cent of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In these conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside a day rate in the North is $.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis, with maximum rates for mobile loading machine operators, approximate $1.09 per hour. In addition, the government provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and

complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places, are, of course, closer by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther, and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working place. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places.

Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for certain tolerance. In any event,

the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours" work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Acts would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and

it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that would paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian agreement (which embodies the customs and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretative Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purpose of the Act.

We therefore respectfully request that your Division issue a supplement to Interpretative Bulletin No. 13, stating that the standards of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1939, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the

several district agreements based thereon, conform to and satisfy the requirements of the Wage and Hour Act.

Respectfully submitted,

For the United Mine Workers of America:

(S) EARL E. HOUCK,
Director of the Legal Department.

For the Operators:

(S) W. L. ROBINSON, Chairman,
(S) CHARLES O'NEILL,
(S) L. T. PUTNAM,
(S) L. C. GUNTER,
(S) J. D. A. MORROW,
Appalachian Joint Conference
Negotiating Committee.

(Plaintiff's Ex. No. 25, R. 1710-16).